

MEMORANDUM**RECEIVED****APR 12 1999**Department of Water Resources
Eastern Region

TO: KARL J. DREHER

FROM: NORM YOUNG *NY*

**RE: COMPLAINTS AGAINST WATER DISTRIBUTION PRACTICES
IN WATER DISTRICT 34 (BIG LOST RIVER AND
TRIBUTARIES)**

DATE: March 20, 1999

On October 29, 1998, John A. McCray filed a formal complaint alleging that distribution of water from Alder Creek in Water District 34 has not been accomplished in accordance with state law. He alleges that the distribution problems began in 1986 when Doug Rosenkrance became watermaster and continue to the present time. At your request and with the assistance of Ms. Harriet Hensley, Deputy Attorney General, an investigation of the complaint has been pursued through a review of documents and interviews with the complainant and others having knowledge of the matter. The investigation has included:

1. A meeting on February 8, 1999 with Carter Fritschle of IDWR's Adjudication Bureau and Susan Hamlin, Deputy Attorney General working with Adjudication Bureau on Basin 34 claims.
2. An interview of Doug Rosenkrance, Basin 34 watermaster, on February 12, 1999.
3. An interview of Ray Boyack on February 25, 1999. Mr. Boyack has filed a statement in support of McCray's complaint alleging improper delivery of his rights in 1988. During the interview, Mr. Boyack provided a copy of a letter of complaint from Lawrence Babcock supporting McCray's complaint and listing other alleged improper actions by Doug Rosenkrance as watermaster. Mr. Babcock's letter, also signed by Dale Smith, Alvin Wheeler, Larmand D. Andersen, Lewis Rothwell and Reva Walker was received in the March 2, 1999 mail.
4. An interview of Ron Schnabel, Big Lost River Irrigation District Manager on February 25, 1999. Ms. Linda Hocking and Doug Rosenkrance participated in parts of this interview at the BLRID office in Mackay.
5. An interview of Don Scarr, former manager of the BLRID, on February 25, 1999.
6. An interview of John McCray on February 26, 1999. This interview was held in the regional office in Idaho Falls. On that date, Mr. McCray provided a letter from Melvin and Vivian Ellwein complaining that Doug Rosenkrance

5. An interview of Don Scarr, former manager of the BLRID, on February 25, 1999.
6. An interview of John McCray on February 26, 1999. This interview was held in the regional office in Idaho Falls. On that date, Mr. McCray provided a letter from Melvin and Vivian Ellwein complaining that Doug Rosenkrance had not properly delivered Alder Creek water to their ranch from 1986 to 1996.

The Boyack, Babcock and Ellwein letters allege distribution problems in addition to those involving Alder Creek. These allegations require additional investigation and will be pursued and responded to in a separate review.

DESCRIPTION OF ALDER CREEK AREA

Alder Creek intersects the Big Lost River from the southwest side of the Lost River Valley about seven miles downstream from Mackay (See attachment A). About one mile upstream from this confluence, the Darlington Ditch intercepts Alder Creek flows. A spill structure with check boards in the side of the ditch allows flows to be directed into the Alder Creek channel below the ditch. About one-quarter mile from the river, Alder Creek then enters the Vanous Ditch. The commingled water flows easterly for about one-quarter mile to a spill structure from which flows in the ditch can be directed to the Big Lost River.

The location of the properties owned by those having rights from Alder Creek is shown on attachment B.

WATER RIGHTS FROM ALDER CREEK

Attachment C lists the water rights from Alder Creek as presently recognized in IDWR's records. This list includes those rights recommended in the Director's Report filed with the SRBA court in 1992 along with changes made to the list by the SRBA court. IDWR instructs the watermaster to distribute water in accordance with this list of rights, as altered from time-to-time by final actions of the SRBA court, under the order for interim administration entered by the SRBA court. Unclaimed/unrecorded domestic and stockwater rights may exist on Alder Creek, but calls for watermaster distribution to such rights are not effective until they are claimed and adjudicated.

Attachment C lists seven rights having a priority date of September 30, 1882 that divert from Alder Creek upstream from the Darlington Ditch. These rights allow a total diversion rate of 8.16 cfs under this priority. Prior to the Snake River Basin Adjudication, IDWR's records listed eight decreed rights with a September 30, 1882 priority date allowing diversion of 20.26 cfs. The difference of about 12 cfs is primarily due to a determination of the SRBA court that most of two rights associated with the ranch now owned by McCray were lost by forfeiture.

The watermaster's son, Shane Rosenkrance, claimed a right for 5 cfs from Alder Creek in the SRBA based upon diversion and beneficial use dating from 1928. This claim, No. 34-10400, was recommended in the Director's Report and, based upon the SRBA court's order of interim administration, has been subject to delivery by the watermaster since 1992. A partial decree has been issued confirming the right.

ISSUES RAISED BY JOHN McCRAY

McCray's complaint relates to two issues. First, McCray asserts that Doug Rosenkrance acted unethically or illegally thereby causing the water rights associated with the property McCray purchased in 1995 from FHA to be declared forfeited. McCray further asserts that Rosenkrance then used his watermaster position to assist his son, Shane, to obtain a "new" right from Alder Creek that benefits from the forfeiture.

Second, McCray asserts that Doug Rosenkrance has improperly delivered Alder Creek water to his son Shane to the injury of holders of senior rights from the Big Lost River and Alder Creek.

At the outset of this investigation, I advised Mr. McCray that IDWR is not the proper forum in which to reassess the testimony and other evidence presented before the SRBA court. A lengthy trial, in which McCray participated as a party and was represented by an attorney addressed the issues of forfeiture, abandonment and resumption of use of Alder Creek water on the property now owned by McCray. Doug and Shane Rosenkrance presented testimony, as did other water users familiar with the distribution of Alder Creek water. Special Master Bilyeu made findings of fact and conclusions of law based on the testimony and other evidence submitted by both the claimants and objectors. At the conclusion of the trial, the special master issued a recommendation finding that all but 0.50 cfs of the water rights claimed for irrigation use of the McCray property had been forfeited. Subsequently, both claimants and objectors challenged the special master's recommendations. After oral argument and briefing, Judge Hurlbutt independently reviewed the evidence presented to the special master to determine whether the findings of fact were supported by substantial evidence and whether Special Master Bilyeu had correctly applied the appropriate law to the facts of the case. Judge Hurlbutt concluded that the special master's findings of fact were supported by substantial evidence and that the special master had correctly applied the law of forfeiture, abandonment and resumption to the facts presented at trial.

It is my conclusion that inquiry by IDWR into the credibility of Doug Rosenkrance's testimony or conduct relative to the SRBA case described above is inappropriate. However, I do believe that the issues raised by McCray about the past and current delivery of Alder Creek water merit considerable attention. I have found the following:

1. Shane Rosenkrance has been receiving Alder Creek water in amounts exceeding the rate authorized by the recorded rights held in his name. BLRID records indicate that such deliveries have been made at times during the irrigation season from 1986 to 1998. The Alder Creek water distributed to

Shane enters Darlington Ditch from Alder Creek and is delivered by the BLRID ditchrider. Prior to the 1992 Director's Report and the order of interim administration, Shane had a recorded right of 0.24 cfs. BLRID records indicate that Alder Creek flows of many times the authorized rate were credited to Shane even during the low flow periods experienced in the Big Lost River basin during the drought period of the late 1980's and early 1990's.

2. Doug Rosenkrance explained that this pattern of delivery was consistent with that used by watermasters in the 1970's and early 1980's. He asserts that he has simply continued a practice with which he was familiar, having been delivered Alder Creek water through Darlington Ditch before he became watermaster. He provided samples of BLRID records from the years 1973 and 1981 to verify that Alder Creek water entering Darlington Ditch had been credited in amounts exceeding the authorized rights. He provided other BLRID records to show that the same procedure was used on other tributaries intercepted by BLRID canals.
3. Doug Rosenkrance explained that he and previous watermasters distribute and account for water diverted by rights on tributaries upstream from the point at which the tributaries enter the BLRID canal system. Once delivered to the BLRID canal system, water from Alder Creek or other tributaries are accounted for and delivered by the BLRID, not the watermaster.
4. Rosenkrance explained that the ditchriders for BLRID measure or estimate the Alder Creek flow entering the Darlington Ditch. The ditchriders record the credits to be received in the BLRID accounting system. Rosenkrance says that he administers the 1882 priority rights diverting from Alder Creek upstream from the Darlington Ditch, but leaves to the BLRID the administration of that entering the Darlington Ditch. He asserts that this is the procedure followed by previous watermasters and provided sample BLRID records from as early as 1973 for documentation.

The present BLRID manager (employed for about one year by the BLRID) was not aware of the issue and did not believe the ditchriders should determine who should receive credit for the Alder Creek water in the Darlington Ditch. He also did not believe the ditchriders should determine a "futile call." Former BLRID manager Don Scarr agreed that BLRID ditchriders accounted for Alder Creek water, but asked for guidance from either the manager or the watermaster in determining who received credit and when to call delivery to the river futile. A letter from Darrell Leavett, a Mackay area ditchrider in 1989, states that the Doug Rosenkrance, as watermaster, determined these issues.

5. Rosenkrance asserted that the responsibility for determining who receives credit for tributary flows entering BLRID canals and the responsibility for

determining whether the flow in the tributary would reach the Big Lost River has been exercised by the BLRID ditchriders. He did not know of the criteria used to make a futile call determination on Alder Creek or other tributaries.

6. The Utah Construction Company v. Abbott, et al decree issued in 1925 and IDWR's Director's Report issued in 1992 in the SRBA provide for rights from certain streams in the Big Lost River Basin to be administered separately from rights from the Big Lost River. Alder Creek is not one of these streams. It is to be administered in priority with the Big Lost River unless a determination is made that curtailing the use by junior rights on Alder Creek does not provide water for senior rights on the River.
7. McCray believes that a futile call exists only if water from Alder Creek does not reach the Darlington Ditch. Any water not delivered to the senior rights from Alder Creek that reaches the Darlington Ditch should cause a reduction in diversions at the head of the Darlington Ditch thereby benefiting the holders of senior rights from the river. Rosenkrance contends that the determination should be based upon whether Alder Creek reaches the Big Lost River.

Rule 20.04 of the Water District 34 Rules provides as follows:

04. Futile Call for the Delivery of Surface Water. When curtailment of junior upstream surface water rights will not make water available for delivery and use to senior downstream surface water rights, without unreasonable waste as determined by the Director, the watermaster will not curtail the junior water rights in a futile effort to deliver water to the senior rights. The Director may consult the Water District 34 advisory board, the Big Lost River Irrigation District and other impacted water users when determining whether attempting to deliver senior downstream surface water rights would be futile.

This rule was promulgated in 1994 and was not in affect during the period about which McCray is complaining.

8. The distinction between the responsibilities and actions of Water District 34 and the BLRID are not always clear. The ditchriders for the BLRID also serve as deputy watermasters for Water District 34. The watermaster had his office in the BLRID office until about 1992. The BLRID did not have a position designated as manager until 1994.
9. The non-use/forfeiture of water from the ranch now owned by McCray substantially increased the amount of water flowing from Alder Creek into the Darlington Ditch throughout the irrigation season. Distribution procedures previously used by watermasters need to be reviewed and revised as necessary to assure distribution in accordance with state law.

RECOMMENDATIONS

Prior to the beginning of the 1999 irrigation season, IDWR must provide guidance and oversight to the watermaster to assure that rights from Alder Creek and other tributaries are delivered in accordance with state law.

1. A guidance document will be prepared by IDWR's Water Distribution Section to address:

a. The watermaster's responsibilities for determining which water rights are in priority to receive water.

b. Procedures to insure that Alder Creek water is not distributed or credited to users in excess of valid rights.

c. The criteria for determining a futile call and the effect on water distribution of a futile call determination.

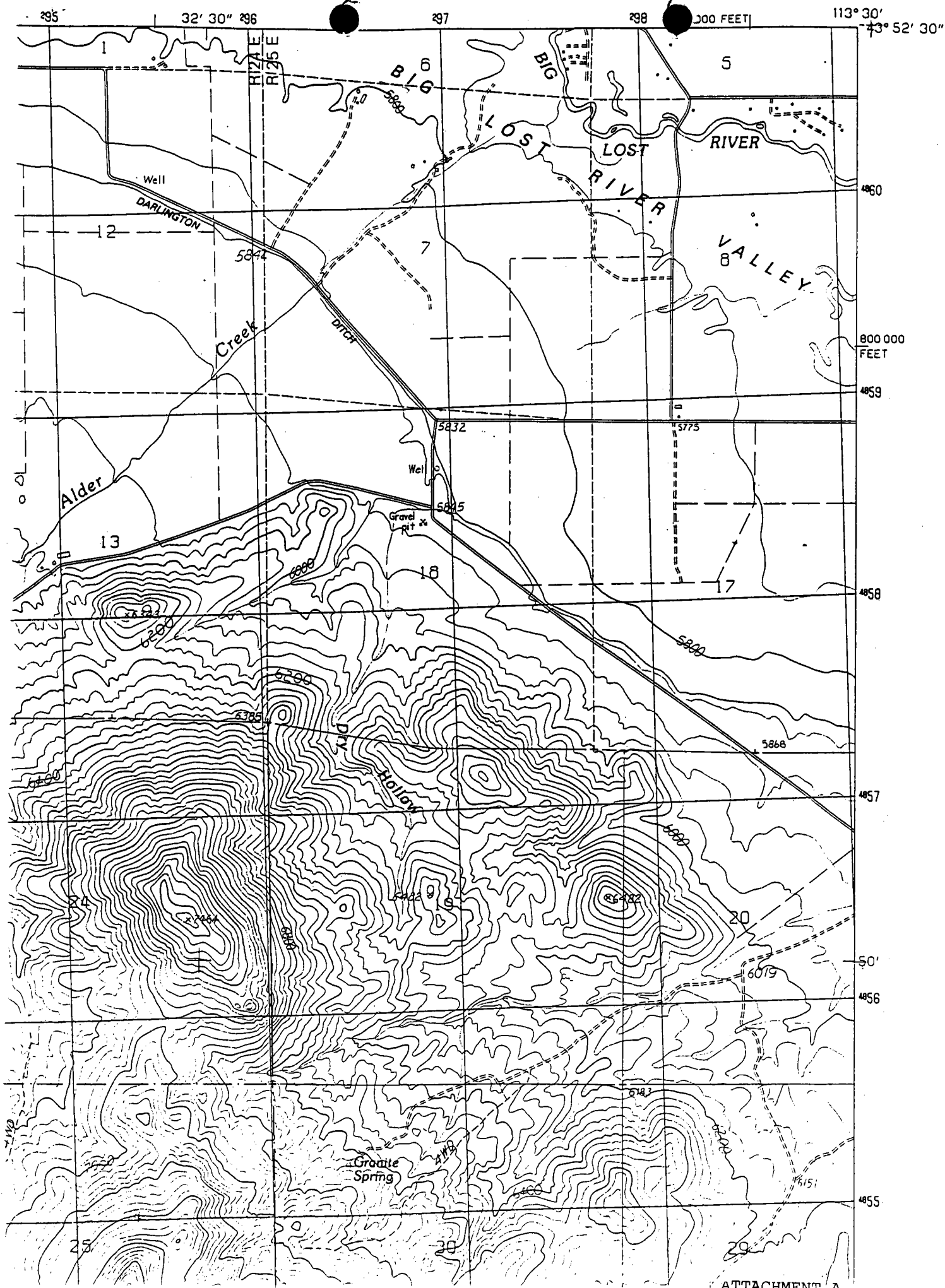
d. The training to be given the watermaster/deputy watermasters/ditch riders to deliver water in accordance with the guidance document.

e. The record keeping procedures needed to demonstrate that the water has been properly distributed.

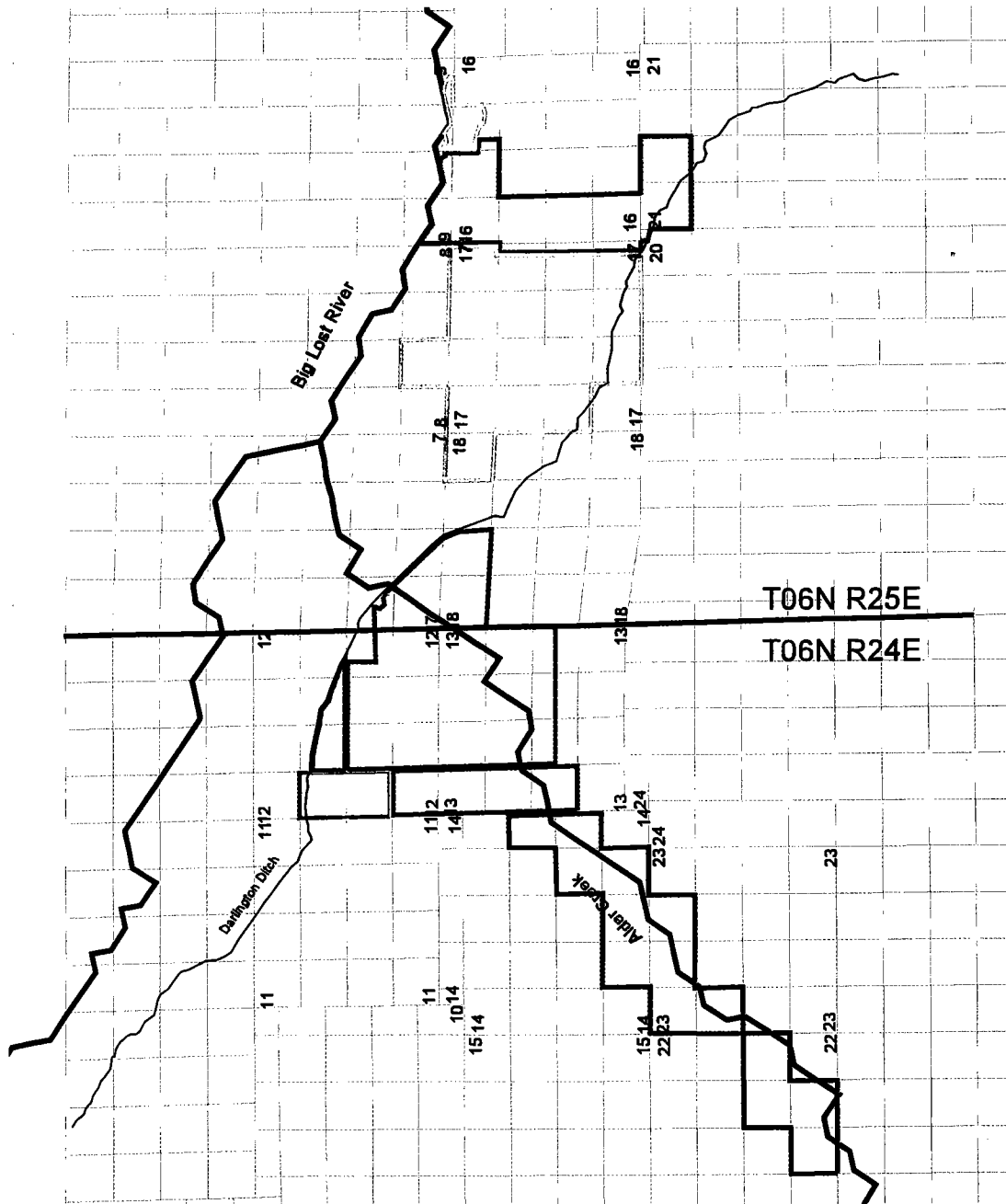
A draft of the guidance document should be distributed for review and comment to the watermaster, McCray and other complainants, the BLRID, and the Water District 34 advisory committee.

2. Water Distribution Section will review the adequacy of measuring devices and control works on diversions from Alder Creek and require installation and repair as necessary before the irrigation season begins. If this is not practical because of weather, snow cover or high stream flows, the devices should be required before water is delivered under a call to the watermaster.

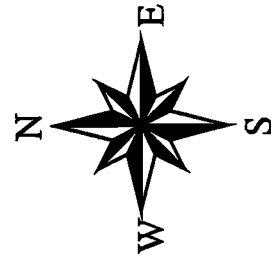
3. DWR will require a measuring device or other acceptable measuring method to be in place at the confluence of Alder Creek and the Darlington Ditch. The installation and maintenance of measuring devices in the natural channels to determine the rate of flow available for distribution to water rights is a responsibility of Water District 34. Alder Creek related rights delivered through the Darlington Ditch should not be delivered unless the capability is in place to measure the discharge from Alder Creek into Darlington Ditch.



Alder Creek Area



- ☐ Carol Palmer
- ☐ Doug Rosenkrance
- ☐ Matea Mc Cray
- ☐ J C Lambert
- ☐ Gordon Player
- ☐ Shane Rosenkrance



OD-5813
AJ5813NP

SELECTION FILE: CLF-34-ALDER-CREEK

IDAHO DEPARTMENT OF WATER RESOURCES
ADJUDICATION WATER MASTER REPORT
BY WATER SOURCE/PRIORITY DATE

DATE: 03/01/99
TIME: 11:53:37
PAGE: 1

*MPOD: Y = Multiple Pts of Diversion, Pod Diversion Rate(s) is 0
U = Multiple Pts of Diversion, Pod Diversion Rate(s) Not 0
N = No Multiple Pts of Diversion (1 or less)

WATER RIGHT	NUMBER	CURRENT OWNER NAME	PRIORITY	DATE	POINT OF DIVERSION	TOTAL DIVERSION	POD DIVERSION NAME	
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WATER SOURCE: ALDER CREEK

R34-10080D	PALMER, THOMAS	09/30/1882	D	06N 24E 23	NESWNW	0.130 CFS		Y 01
34-12050	ROSENKRANCE, DOUG G	09/30/1882	D	06N 24E 14	NWNESE 18	4.760 CFS		N 01
R34-00606	MATEA MC CRAY PARTNERS	09/30/1882	D	06N 24E 13	SWSNW B	0.520 CFS		Y 01
R34-00600	MATEA MC CRAY PARTNERS	09/30/1882	D	06N 24E 13	SWSNW B	0.520 CFS		Y 01
R34-10080B	GATES, MARK T	09/30/1882	D	06N 24E 22	NESESW	0.110 CFS		Y 01
R34-10080C	PALMER, CARROLL	09/30/1882	D	06N 24E 23	NESWNW	2.380 CFS		Y 01
34-00365A	ROSENKRANCE, DELORES I	09/30/1882	D	06N 24E 14	NWNESE 18	0.240 CFS		N 01
34-00333	LAMBERT, JAMES C	06/30/1896	D	07N 24E 33	NWSWNE R	1.300 CFS		Y 01
R34-00682A	PLAYER, A GORDON	06/01/1909	D	06N 25E 7	NWNWSW 3	0.260 CFS		N 01
R34-00682B	ROSENKRANCE, SHANE D	06/01/1909	D	06N 25E 7	NWNWSW 3	0.240 CFS		N 01
34-10400	ROSENKRANCE, SHANE D	05/01/1928	D	06N 25E 7	NWNWSW 3	5.000 CFS		N 01